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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GEORGE BANUELOS, Defendant and Appellant.	B202512 (Los Angeles County Super. Ct. No. VA095370)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dewey Lawes Falcone, Judge. Affirmed.

Kim Malcheski, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant George Banuelos appeals from his conviction of second degree murder (Pen. Code, § 187) with an enhancement for personally discharging a firearm in commission of the crime (Pen. Code, § 12022.53). He raises three issues on appeal: improper admission of lay opinion evidence, ineffective representation by his attorney because of the failure of counsel to request an instruction on the theory of defense of others, and lack of substantial evidence to support a restitution order. Finding no reversible error, we shall affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The prosecution theory was that defendant, while attending a party at a home, shot and killed one of the persons there, who already had been wounded by a knife attack and was crouched behind a car. Defendant's theory is that he shot the person in self-defense and to protect others at the party, and that he did so only after the person had shot at him. Each side presented evidence to support its position. The jury resolved the factual issue in favor of the prosecution. Except with respect to the restitution order, no issue of substantiality of evidence is argued. In reviewing the record, we presume "'"in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence" [citation] . . . whether direct or circumstantial evidence is involved.'" (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.)

A party was held at the Rodriguez residence in Santa Fe Springs on May 13, 2007. It was prom night, and a large number of young persons were in attendance. Among them were Vanessa Melendez and her boyfriend, Andrew Salinas, Lizette Rodriguez, whose birthday it was, her parents, and defendant. Defendant resided at the Rodriguez residence, having rented a room there. He was older than the high school students who were at the party, and, according to him, he was there as a chaperone.

At some point, a fight broke out in the back yard of the residence. It soon grew into a melee. Vanessa was inside the house when she heard gunshots from the backyard. Going outside, she saw her boyfriend, Salinas, fighting. He was stabbed twice while standing in front of Vanessa, trying to protect her. He was in pain, and Vanessa and

several friends helped him walk to the front of the house. Pablo Mendoza, one of the persons attending the party, was inside the house when he heard gunshots. Going outside to the backyard, he saw defendant walk out the back door and pull a revolver from a holster or from his pocket. Juan Cardenas, another guest, heard the commotion in the backyard. He saw that defendant was involved in a fight, and that Salinas already had been stabbed. He was helping Salinas walk to a car to be taken to a hospital when he saw defendant walk down the front steps holding a gun. Defendant appeared to be angry, as did Salinas.

Cardenas saw defendant walk down the front steps of the house, armed with a revolver. Cardenas went to a grassy area beside a wall, while Salinas hid behind a car in the driveway. Defendant pointed a gun at Salinas, hesitated, then shot him. Salinas had been crouching down beside the car. After he was shot, he fell to the ground. Defendant ran back into the house. After that, while inside the house, Mendoza saw a young woman come up to defendant and tell him, "You killed my friend . . . . Why did you do that?" Defendant said nothing; he simply shrugged his shoulders. Cardenas and another person got Salinas into a car and proceeded to drive to a hospital, but Salinas was dead.

City of Whittier police arrived and transported everyone at the house, including defendant, to a police station, where they conducted interviews. One of the persons interviewed identified defendant as the person who had shot Salinas.

Whittier Police Officer Chad Hoeppner interviewed defendant. Defendant's version was that he was inside the house during the fighting and shooting and was not involved. Officer Hoeppner testified that he did not believe defendant, a circumstance we shall discuss in further detail. The reason for his disbelief was that defendant avoided eye contact and was constantly moving around in his chair. The officer told defendant that he was free to leave, but defendant remained and held to his story of noninvolvement.

Officer Michael Redmon took over the interview. Using a ploy, he told defendant that "maybe this was self-defense. You need to let me know one way or the other." At

that point defendant's eyes lit up and he said, "[Y]eah, yeah. That's what it was, self-defense." That was some 30 seconds into Officer Redmon's interview.

Defendant's story then, and at trial, was that he was in the front yard heading to the gate when he saw Nelly Quinonez being harassed. Defendant told the harassers to leave her alone. Then someone put a gun to defendant's head. He looked back, saw the gun, and ran into the house, where he asked Mrs. Rodriguez to call the police. Besides renting a room at the Rodriguez home, defendant also worked for Mr. Rodriguez, whom he knew to keep a gun in the toolbox of a vehicle that was parked across the street. He went to get the gun in order to get the persons at the party to leave. He retrieved the gun from the toolbox, put it in his waistband, returned to the backyard and, brandishing the gun, told everyone to leave, and that the "party is over." They proceeded to leave, running, yelling and screaming. Defendant then went to the front yard. He was standing on the front step of the porch, in front of a car, when he saw five or six persons approaching, pulling on him, and saying, "There he goes, get him." Two of the group were armed with knives. Defendant pulled out the gun to scare off the group.

One of the group ran over to the car, where he pulled a gun from his waistband and pointed it at defendant. This person, Salinas, fired two or three shots at defendant, missing him. Defendant fired a single shot at Salinas, hitting him. Defendant then hid the gun between the wall and a board in a bathroom adjacent to the garage of the residence. That is where Officer Redmon found the gun, which was loaded with several live rounds. Defendant testified that he could not recall whether Salinas was the person who had held a gun to his head.

An information was filed charging defendant with murder and personal firearm use. He pleaded not guilty and the case was tried to a jury, which convicted him of the charges. He was sentenced to an aggregate term of 40 years to life, and a restitution fine was imposed in the amount of $7,500. He filed a timely appeal from that judgment.

DISCUSSION

I

On direct examination of Officer Hoeppner, the prosecutor elicited defendant's initial statement in interrogation that he was inside the Rodriguez home when the shooting occurred and was not involved. The officer was then asked whether he believed defendant. He answered, "No sir." There was an objection on lack of relevance, which was overruled. (The Reporter's Transcript shows the objection as having been made after the answer; we assume the answer came before counsel had time to lodge an objection, and we regard it as timely.) The prosecutor asked why the officer disbelieved the defendant, and the officer answered that it was because he had other information indicating defendant's culpability, and because of defendant's demeanor while answering, which we have discussed. A similar question was asked of the officer twice more during his direct examination, eliciting the same response. There was no objection on these occasions, apparently because defense counsel thought that a further objection on relevancy grounds would have been useless in light of the earlier ruling.

On appeal, defendant argues that the officer's opinion whether defendant had lied to him was irrelevant, that the objection should have been sustained, that the ruling violated defendant's constitutional right to due process, and that the failure of counsel to object on constitutional grounds as well as relevance deprived defendant of his constitutional right to effective assistance of counsel. The People argue there was no error in the relevance ruling, that defendant forfeited the constitutional claim by failing to raise it at trial, and that any error was harmless.

Each side has some merit in its position. The opinion of a lay witness as to whether another person is telling the truth or lying, offered on that issue, is improper and inadmissible. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 40; see also *People v. Mason* (1960) 183 Cal.App.2d 168, 173 [improper to ask lay witness for opinion on guilt or innocence]; *People v. Torres* (1995) 33 Cal.App.4th 37, 45 [police officer's testimony whether crime was committed and whether defendant was guilty invaded province of jury]; and see 1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 23, p. 552.)

Since the officer's opinion is not admissible on this issue, the opinion is not relevant and should not have been admitted.

Of course, the opinion may be admissible on another issue, such as to explain the officer's subsequent conduct. (See *People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 34.) And, in fact, when defense counsel raised the point later in the trial, the court explained (as it apparently had done, off the record, at an earlier point) that its ruling was based on its view that the question was foundational. The problem with that explanation is that there does not appear to have been any question of impropriety in conducting a further investigation, so the foundation also was irrelevant. Beyond that, a limiting instruction should have been requested and given if the evidence was being received only to explain the officer's subsequent conduct. But nothing was said at the time about the evidence being admitted for a limited purpose; it came in "at large."

It is true that defense counsel did not make a constitutional argument when he objected to the evidence, and failure to do so does forfeit the point on appeal. (*People v. Harris* (2005) 37 Cal.4th 310, 336.) There is an exception to that rule where the evidentiary ruling results in a due process violation. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) But "the application of ordinary rules of evidence does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of *People v. Watson* (1956) 46 Cal.2d 818, 836." (*People v. Harris, supra,* at p. 336.)

The ruling in this case was nothing more than an application of an ordinary rule of evidence, and the error does not vault it to a constitutional dimension. In any event, the error was harmless by any standard. When this part of the examination is read in context, the flow indicates that the prosecutor was taking Officer Hoeppner through the steps he took in interrogating defendant. It is significant that no effort was made to qualify the officer as an expert in judging credibility, and nothing of the sort was urged to the jury in closing argument.

Most significantly, the questions concerned defendant's initial alibi statement to the officer—that he had nothing to do with the shooting. Defendant himself gave a

totally different story to Officer Redmon after the idea of self-defense was suggested to him. He presented that version when he testified as a witness on his own behalf. On direct examination, he acknowledged that he had lied to Officer Hoeppner. Defense counsel argued to the jury that his client had lied to the officer. Thus, even if it were true that Officer Hoeppner's testimony about not believing defendant was offered and received as evidence that defendant had lied, there could be no prejudice since he admitted that he lied. In fact, given the defense he presented, unless he denied that he had made the statement to Officer Hoeppner, he had to acknowledge the lie because the first version he had given was entirely at odds with his self-defense theory.

In sum, there was no prejudice and, obviously, no deprivation of defendant's constitutional right to the effective assistance of counsel.

II

Defendant's second argument is that the trial court should have instructed, sua sponte, that defendant shot Salinas in defense of others who might have been harmed. The jury was instructed on self-defense. The claim that the shooting occurred in an effort to protect other persons who were present is weak given the evidence presented. But there is some basis for it, and respondent concedes it was error for the trial court to fail to instruct on the point, even though not asked to do so. Assuming there was error, it was harmless.

Defendant's position at trial was that he shot Salinas because Salinas had just shot at him, firing several shots but missing. Obviously, under that theory, defendant shot back to protect his own life, i.e., in self-defense. He also may have been motivated to protect others, but there is no way he could realistically argue that he was not acting in his own self-defense. In fact, he makes no such argument. By its verdict, the jury found that defendant had failed to raise even a reasonable doubt about the truth of his version of events. If his shooting of Salinas, who, he said, had just shot at him, was not in self-defense, it hardly could have been in defense of others.

III

Defendant's final argument is that the trial court erred in imposing a $7,500 restitution award under Penal Code section 1202.4. He argues that the only basis for this order was the prosecutor's hearsay statement that the state had "'sent an order in for funeral and burial expenses that were paid by the Victim's Compensation Board for $7,500.'" Defendant objects that no documentary evidence was presented to support the award, and, for that reason, it is not supported by substantial evidence.

The governing provision is subdivision (f)(4)(B) of the statute. It provides:

"The amount of assistance provided by the Restitution Fund shall be established by copies of bills submitted to the California Victim Compensation and Government Claims Board reflecting the amount paid by the board and whether the services for which payment was made were for medical or dental expenses, funeral or burial expenses, mental health counseling, wage or support losses, or rehabilitation. Certified copies of these bills provided by the board and redacted to protect the privacy and safety of the victim or any legal privilege, together with a statement made under penalty of perjury by the custodian of records that those bills were submitted to and were paid by the board, shall be sufficient to meet this requirement."

This paragraph appears to be in two parts. The first sentence discusses how it is established that the Board provided assistance to the victim or the victim's family, and the amount it provided. Defendant does not appear to dispute that the Board did pay out $7,500 for funeral and burial expenses. The second sentence goes to justification for the amount paid out. This is indicated by the provision that certified copies of the bills (rather than the bills themselves, or some other kind of business record) shall be provided, after redaction to protect privacy and safety of the victim and any legal privilege, together with a statement under penalty of perjury that the bills were in fact submitted and paid. If that is done, it is sufficient to meet the proof requirement. This language indicates that the evidence described is to be made available to the defense.

When the issue came up at sentencing, the court said it had signed two restitution orders, at which point defense counsel asked what those might be and said he had not

received a copy. The court said the prosecutor would give defense counsel a copy, and the prosecutor said, "Yes, Your Honor." He added that the Victim's Compensation Board paid funeral and burial expenses in the amount of $7,500.

That is all the record before us shows. Defendant raised no further objection. In particular, there is no indication that the prosecutor failed to keep his promise to furnish the documents to defense counsel, much less that defense counsel raised an issue about his failure to do so. Absent some evidence to the contrary, we may presume that the prosecutor honored his promise. (Evid. Code, § 664 ["It is presumed that official duty has been regularly performed."].) Under the circumstances presented, any claim to the contrary is forfeited by failure to take some further action before the trial court.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.